Office - Supreme Court, U.S.
FILED
MAY 18 1953
HAROLD B. WILLEY, Clerk

1470

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. [redacted]76

HOWARD DORTCH,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RODES K. MYERS,
Counsel for Petitioner.

MYERS AND LOGAN,
Of Counsel.

INDEX

Subject Index

	Page
Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit	1
Summary Statement of the Matter Involved	1
The Conviction and Subsequent Proceedings	2
Statement of the Jurisdiction of this Court	3
Statutory Provision Believed to Sustain the Jurisdiction	3
The Date of the Judgment to be Reviewed	3
Statement of the Nature of the Case and the Rulings of the Court of Appeals Bringing the Case Within the Jurisdiction of this Court	3
Cases Believed to Sustain the Jurisdiction of this Court	3
The Questions Presented	4
Reasons Relied on for the Allowance of the Writ	4
Conclusion	4

Table of Cases Cited

Brock v. *State of North Carolina*, 72 Sup. Ct. 349	4
United States of America v. *Jay G. Williams*, 71 Sup. Ct. 77, 93 Fed. Supp. 922	4

Statutes and Other Authorities Cited

Constitution of the United States. Fifth Amendment	2
United States Code Annotated, Title 18, Section 1992	1
Title 28, Section 1254	3
Section 2101	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 806

HOWARD DORTCH,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Howard Dortch, in support of his petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Sixth Circuit, entered April 17, 1953, affirming his conviction for violation of U. S. C. A. 18, Sec. 1992 on October 24, 1949, respectfully shows:

A

Summary Statement of the Matter Involved

This proceeding originated when the petitioner was indicted by a Grand Jury in the United States District Court for the Western District of Kentucky at its February Term, 1950, at Owensboro, Kentucky, the number of said Indictment being 5136. The petitioner under this indictment was jointly indicted with one Ewin Riley. On No-

vember 14, 1950 in the Bowling Green Division of the United States District Court for the Western District of Kentucky, both Riley and the petitioner, Dortch, were tried, after the indictment having been called for trial at four successive previous terms of the District Court. Riley, as well as the petitioner, were formally arraigned under this indictment, the Jury was duly impanelled and sworn and evidence was offered and heard by both sides. The Jury subsequently returned its verdict, finding Riley guilty and no verdict as to the petitioner, Dortch, and orally reported to the Court, through its foreman, that they were unable to agree as to the petitioner, Dortch. Thereupon, the Court discharged the Jury. On May 19, 1952 a Grand Jury of the Owensboro Division of the United States District Court for the Western District of Kentucky returned indictment No. 5238, charging the petitioner, Dortch, with the same offense. Petitioner, Dortch, was arraigned under indictment No. 5238 on September 8, 1952 and tried on September 17th of 1952. He was found guilty and his punishment fixed at ten years in the penitentiary.

The Conviction and Subsequent Proceedings

Upon these facts the trial court entered its final judgment on the 18th day of September, 1952, and judgment and sentence were pronounced on the 18th day of September, 1952.

An appeal was taken to the Court of Appeals, Howard Dortch *vs.* United States of America, #11736. Upon appeal, in the court below, petitioner contended:

(1) The trial of this petitioner under indictment No. 5238 violated and prejudiced his rights under the Fifth Amendment to the Constitution of the United States by placing the petitioner in jeopardy twice for the same offense. This petition is filed within thirty days next after final judgment on April 17, 1953.

B

Statement of the Jurisdiction of this Court

(1) *Statutory Provision Believed to Sustain the Jurisdiction.*

The jurisdiction of this Court is invoked under sections 1254 and 2101 of Title 28 of the United States Code.

(2) *The Date of the Judgment to be Reviewed.*

The judgment of the Court of Appeals for the Sixth Circuit affirming the conviction of petitioner was entered April 17, 1953. This petition, with supporting brief, and the certified record, are filed within thirty days next after final judgment.

(3) *Statement of the Nature of the Case and the Rulings of the Court of Appeals Bringing the Case Within the Jurisdiction of this Court.*

The nature of the case has been heretofore stated. The Court of Appeals ruled:

(1) That the trial of the petitioner under indictment #5238 did not violate or prejudice his rights under the Fifth Amendment of the Constitution of the United States by placing him in jeopardy twice for the same offense.

(4) *Cases Believed to Sustain the Jurisdiction of this Court.*

This court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the writ of certiorari.

C

The Questions Presented

(1) Did the trial of this petitioner under indictment #5238 violate and prejudice the rights of this petitioner under the Fifth Amendment of the Constitution of the United States by placing him in jeopardy twice for the same offense?

D

Reasons Relied on for the Allowance of the Writ

(1) In ruling that the trial of petitioner under indictment #5238 did not violate and prejudice his rights under the Fifth Amendment of the Constitution of the United States by placing him in jeopardy twice for the same offense, the Court of Appeals has decided a Federal question in apparent conflict with applicable decisions of this Court, viz:

United States of America, Appellant v. *Jay G. Williams*, 71 Supreme Court 77, 93 Fed. Sup. 922.

The Circuit Court of Appeals also has decided this case in apparent conflict with the reasoning of both the majority and dissenting opinions of the Supreme Court of the United States rendered in the case of *Brock* vs. *State of North Carolina*, 72 S. Ct. 349-358, and the cases cited therein. 344 U. S. 424

Conclusion

The question presented is of grave importance. It presents a case of an offense to fundamental fairness and due process. The facts will bear out that the basis for the motion of the United States District Attorney to dismiss indictment #5136 would at a later date be able to present a stronger case against this petitioner and in fact did so.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket #11736, Criminal, Howard Dortch, Appellant *vs.* United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment of said Court of Appeals be reversed by this Court and your petitioner prays that the certified copy of the record and proceedings of the said United States Court of Appeals for the Sixth Circuit, filed with this petition, may be treated as a return to said writ of certiorari and your petitioner prays that he may have such other and further remedies in the premises as the Court may deem appropriate and in conformity with law.

RODES K. MYERS,
Counsel for Petitioner.

MYERS AND LOGAN,
Of Counsel.

FILED
JUN 8 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. [redacted]76

HOWARD DORTCH,

Petitioner,

vs.

UNITED STATES OF AMERICA

AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes the petitioner, Howard Dortch, and asks leave to amend his petition for a Writ of Certiorari and requests that the same be printed as a supplement to the original petition for the reason that through oversight the material and most salient fact was omitted from the petition, either by the dictation thereof or by the typing thereof. This omission occurs on the thirteenth line of page two of the printed original petition.

Said original petition, as amended, should have inserted after the word "Jury" a new paragraph as follows:

That indictment No. 5136, after the hung Jury, as to Dortch, on November 14, 1950, was dismissed by the Court,

but by an Order entered April 10, 1951, and which order is substantiated by the record, is as follows:

"Order—Entered April 10, 1951

This case coming on for trial, the defendant being present by counsel, Hobson L. James, Jr., and Beckham R. Robertson, on motion of the United States Attorney and for the reasons stated by him that this case has been called for trial on three previous occasions, the case having been tried on a fourth occasion, and that trial resulting in a hung jury as to the defendant Howard Dortch, and as further stated by the United States Attorney that the chief witness for the Government had repudiated all statements heretofore made by him involving the defendant Howard Dortch, the witness having stated that he would repudiate said statements if called as a witness,

It is hereby Ordered that this case be and the same hereby is dismissed.

(S.) MAC SWINFORD,
Judge, U. S. District Court."

Such order shows a final dismissal of the case and not a "nolle prosequi". The petitioner could not have been tried under indictment No. 5238 with the same advantage to himself as under indictment No. 5136 which was dismissed by the preceding quoted order. The lapse of time between November 14, 1950, and the date of his trial under indictment No. 5238 (the new indictment) September 17, 1952, or approximately twenty-two months, causes the Petitioner to be confronted by a new and surprise witness, which operated to the Petitioner's disadvantage.

Indictment No. 5238 was returned by a Grand Jury of the Owensboro Division and charged the Petitioner with the identical offense. Petitioner, Dortch, was arraigned under indictment No. 5238 on September 8, 1952, and tried on

September 17, 1952, and was found guilty and his punishment fixed at ten years in the penitentiary.

The Petitioner states that except for this insertion, which was due to oversight, the remainder of the original petition is correct.

RODES K. MYERS,
Counsel for Petitioner.

MYERS AND LOGAN,
Of Counsel.

(8503)

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Argument	3
Conclusion	5

CASES:

Amrine v. *Tines*, 131 F. 2d 827	4
Dealy v. *United States*, 152 U.S. 539	4
District of Columbia v. *Buckley*, 128 F. 2d 17, certiorari denied, 317 U.S. 658	4
Dreyer v. *United States*, 187 U.S. 71	3
Hensley v. *United States*, 160 F. 2d 257, certiorari denied, 331 U.S. 817	4
Keerl v. *Montana*, 213 U.S. 135	3
Logan v. *United States*, 144 U.S. 263	3
Lynch v. *United States*, 189 F. 2d 476, certiorari denied, 342 U.S. 831	4
United States v. *Fox*, 130 F. 2d 56, certiorari denied, 317 U.S. 666	4
United States v. *Perez*, 9 Wheat. 579	3

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 76

HOWARD DORTCH, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 66-68) is reported at 203 F. 2d 709.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1953 (R. 68-69). The petition for a writ of certiorari was filed on May 18, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Where the jury disagreed as to petitioner's guilt under an indictment which was later dismissed upon the Government's motion when the case was called for trial again but before any further proceedings were had, does a conviction under a second indictment containing the same charge subject the petitioner to double jeopardy in violation of the Fifth Amendment.

STATEMENT

An indictment in two counts under 18 U.S.C. 1992 was returned against petitioner and one Riley in the United States District Court for the Western District of Kentucky charging them with dynamiting a railroad bridge used in interstate commerce (R. 10-11). On the trial on November 15, 1950, Riley was convicted, but the jury were unable to reach a verdict as to petitioner. When the case came on for trial again on April 10, 1951, petitioner being present with his counsel, the government attorney announced that the case had been called for trial on three previous occasions, that on the fourth the trial resulted in a hung jury as to petitioner, and that the chief witness for the Government had now repudiated, and would repudiate, if called as a witness, all statements made by him involving petitioner. The District Court thereupon "Ordered that this case be and the same is hereby dismissed." (R. 12-13.)

On May 19, 1952, petitioner was again indicted, this time in one count identical with the second count of the indictment previously dismissed (R. 4). Petitioner's motion to dismiss this second indictment on the ground of double jeopardy under the Fifth Amendment was overruled (R. 5-8). The trial proceeded, petitioner was found guilty, and was sentenced to ten years' imprisonment (R. 17-19). On appeal the conviction was unanimously affirmed (R. 68-69).

ARGUMENT

There is no merit to petitioner's contention that forcing him to stand trial under the second indictment, after dismissal of the first, placed him in double jeopardy in violation of the Fifth Amendment.

No jeopardy attached as a result of the failure of the jury to return a verdict as to the petitioner in the November 15, 1950, trial upon the first indictment, for it is well settled that if a jury disagrees as to a verdict in a criminal trial, a second trial is not in violation of the double jeopardy clause. *United States* v. *Perez*, 9 Wheat. 579; *Logan* v. *United States*, 144 U.S. 263, 297-298; *Dreyer* v. *United States*, 187 U.S. 71, 85-86; *Keerl* v. *Montana*, 213 U.S. 135, 138.

Nor did any jeopardy attach as a result of the dismissal of the indictment by District Judge Swinford on April 10, 1951, upon the motion of government counsel. That dismissal, as the court

below held (R. 67-68), was without prejudice and, accordingly, was equivalent to a *nolle prosequi*. Indeed, it was Judge Swinford who, necessarily interpreting his own order, overruled petitioner's motion, based upon that order, to dismiss the second indictment (R. 5-8). Unlike an acquittal, a *nolle prosequi* or dismissal without prejudice does not free the accused from further prosecution for the offense charged, and is not a bar to a second indictment covering the same matter. Cf. *Dealy* v. *United States*, 152 U.S. 539, 542; *United States* v. *Fox*, 130 F. 2d 56, 58 (C.A. 3), certiorari denied, 317 U.S. 666; *District of Columbia* v. *Buckley*, 128 F. 2d 17, 20 (C.A. D.C.), certiorari denied, 317 U.S. 658. See also *Hensley* v. *United States*, 160 F. 2d 257, 258 (C.A. D.C.), certiorari denied, 331 U.S. 817; *Amrine* v. *Tines*, 131 F. 2d 827, 834-835 (C.A. 10).

The dismissal of the first indictment without prejudice was completely proper. No proceedings had been begun when the case was called on April 10, 1951, and no jeopardy could have attached to the petitioner. Further, there is nothing in the record to show that petitioner objected to the dismissal, or insisted that he be tried only on this indictment. The fact that the Government obtained a new indictment against petitioner is immaterial. Cf. *Lynch* v. *United States*, 189 F. 2d 476, 478-479 (C.A. 5), certiorari denied, 342 U.S. 831, holding that where a mistrial had been declared, the Government could try the

accused again on the same, or a new indictment for the same offense, and the mistrial was not a bar to a subsequent trial.

Since neither the jury disagreement of November 15, 1950, nor the *nolle prosequi* of April 10, 1951, was a bar to a second prosecution, the concurrence of both these events did not operate to create such a bar. The second indictment was admittedly returned before the statute of limitations had run. The fact that testimony (R. 41-46), which was favorable to the Government and strengthened the prosecution's case, came into existence subsequent to the first trial, does not alter the situation. Inasmuch as petitioner had never been acquitted, the Government properly brought before the court the proof of his guilt.

CONCLUSION

This case was correctly decided under settled principles of law, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

OSCAR H. DAVIS,
Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY 1953.

☆U. S. GOVERNMENT PRINTING OFFICE 1953—263048/P.O.34